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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

MICHAEL ZELENY.

**Plaintiff,**

vs.

EDMUND G. BROWN, Jr., *et al.*,

### Defendants.

Case No. CV 17-7357 JCS

Assigned to:  
The Honorable Richard G. Seeborg

**PLAINTIFF'S NOTICE OF  
APPLICATION AND APPLICATION  
FOR LEAVE TO FILE A SUR-REPLY  
TO ADDRESS NEW MATTER RAISED  
IN REPLY ON NEW ENTERPRISE  
ASSOCIATES' MOTION TO QUASH**

Date: March 7, 2019  
Time: 1:30 p.m.  
Courtroom: 3 (17<sup>th</sup> Floor)

[Filed Concurrently:  
1. Proposed Surreply]

Action Filed: December 28, 2017  
Trial Date: November 18, 2019

1           **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2           PLEASE TAKE NOTICE that plaintiff Michael Zeleny (“Zeleny”) hereby applies for  
 3 leave to file a short, four-page sur-reply to address an issue of first impression raised by New  
 4 Enterprise Associate (“NEA”) in its Reply in Support of Its Motion to Quash.

5           This application is made on the grounds that (a) NEA raised new matter in Reply brief,  
 6 which Zeleny did not have the chance to address fully in his Opposition, and (b) NEA’s Reply  
 7 inaccurately states the law bearing on a First Amendment issue of apparent first impression.

8           *First*, NEA’s argument that the truth of speech is wholly irrelevant to its First  
 9 Amendment Value is new matter raised in reply. NEA paid short shrift in its opening brief to  
 10 the First Amendment issues supporting Zeleny’s subpoena. It did not develop this First  
 11 Amendment argument, instead wrongly asserting that Zeleny seeks discovery to “morally  
 12 condemn” NEA or “publicize” its conduct. (*See* Opp. at 8; Affeld Decl. ¶ 20). NEA waited  
 13 until its Reply to flesh out its position on the First Amendment issues, depriving Zeleny of a  
 14 chance to address its actual argument.

15           *Second*, and relatedly, NEA’s argument on the First Amendment raises an issue of first  
 16 impression on which NEA is simply wrong. NEA asks this Court to hold, without precedent,  
 17 that the truth of First Amendment speech is irrelevant to whether it has “serious value” under  
 18 the *Miller* test for obscenity. No court has ever so held. Instead, NEA’s argument is based on  
 19 a fundamental misreading of Supreme Court authority that gave rise to the *Miller* test. Its late  
 20 coming argument invites error on a novel constitutional question.

21           Accordingly, Zeleny asks the Court to consider his short sur-reply on this important  
 22 and unsettled issue.

23           Dated: February 21, 2019

Respectfully submitted,

24           s/ Damion Robinson  
 25           David W. Affeld  
 26           Damion D. D. Robinson  
 27           Affeld Grivakes LLP  
 28           Attorneys for Plaintiff Michael Zeleny

1                   **PROOF OF SERVICE**

2                   I hereby certify that on February 21, 2019, I electronically filed the foregoing  
3 document using the Court's CM/ECF system. I am informed and believe that the CM/ECF  
system will send a notice of electronic filing to the interested parties.

4                   s/ Damion Robinson  
5                   Damion Robinson